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Supreme Court, U.S.
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No. 93-1328

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

INTERNATIONAL UNION OF ELECTRONIC, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AND INDUSTRIAL UNION DEPARTMENT, AFL-CIO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS[1/]

The Petition points to the failure of the Federal Circuit to conduct a threshold analysis of the words of the antidumping law to determine "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), *reh'g denied*, 468 U.S. 1227 (1984). The Federal Circuit's analysis under *Chevron* focuses entirely on the deference to which an agency is entitled when it chooses one interpretation of statutory language that is open to other possible meanings. Pet. App. 14-16. Since Congress has spoken directly to the two issues raised in the Petition, the Federal Circuit's extension of deference to the Department was inappropriate.

1. The Department of Commerce's so-called accounting approach to the tax adjustment established in 19 U.S.C. § 1677a(d)(1)(C) calls for the full amount of the tax to be added to United States price when the foreign producer's records show that it paid the tax to its government even though the amount of the tax is not separately stated as part of the price paid by its customer. Pet. App. 16-17. This accounting approach merely confirms that taxes were paid on home market sales but does not ascertain who actually paid or bore the burden of those taxes. It therefore assumes full pass-through of the tax and renders superfluous the "but only to the extent that" language that was specifically added to the statute in 1974.

1/ Pursuant to Rule 29.1, none of the petitioning labor organizations are publicly owned corporations that issue shares to the public.

From its inception in 1921 until its amendment in 1974, the antidumping law directed that United States price be adjusted upward by " . . . the amount of any taxes *imposed* in the country of exportation *upon the manufacturer*, producer, or seller, in respect to the manufacture, production or sale of the merchandise, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." Pub. L. No. 67-10, §§ 203 and 204, 42 Stat. 9 (1921). 19 U.S.C. §§ 162, 163 (1965) (emphasis added). The increase to United States price, in other words, has always been conditioned upon there being a tax imposed on the manufacturer in the country of exportation.

The 1974 amendments, Pub. L. No. 93-618, §§ 321(b) and (c), 88 Stat. 1978 (1975), represented a major shift in the focus of this provision away from taxes *imposed upon the manufacturer* to taxes passed through to *purchasers* by virtue of their inclusion in the purchase price. The phrase, "but only to the extent that," makes it plain that not only must the tax be paid on the sale in the foreign respondent's home market, as mandated since 1921, but that the burden of the tax must also be borne by the purchaser, and only to that extent may United States price be adjusted upward. The Federal Circuit has assigned to the words included in 1974 nothing more than the meaning that this provision had between 1921 and 1974 and thereby has disregarded the well-established maxim that enactment of an amendment always is construed to import a change in meaning unless the contrary is made plainly to appear in other ways. *United States v. American Brown Boveri Elec. Corp.*, 17 C.C.P.A. 329, 333, T.D. 43,776 (1929).

The 1974 amendment may have left the precise method for measuring home market taxes open to agency discretion, but there can be no doubt that the Department was directed to measure home market taxes and to limit the upward adjustment to United States price in accordance with that measurement. Failure to give effect to the plain meaning of the words added to the law in 1974 cannot be defended under the *Chevron* doctrine, which extends deference only where the statute is open to more than one interpretation.

2. 19 U.S.C. § 1673f(a) extends a cap on the liability for the payment of certain antidumping duties in situations where the importer's liability is secured by a cash deposit. The Department has "flip-flopped" several times in its interpretation of this provision, initially holding that the cap extended only to liabilities secured by cash deposits, then shifting to the position that the cap extended to both cash deposits and bonds, and most recently appearing to revert to its original interpretation that cash deposits alone cap the importer's liability. Petition for Certiorari at 17-18. The Federal Circuit overturned the ruling of the U.S. Court of International Trade that the plain meaning of this statutory provision extended the cap only to liabilities secured by cash deposits, even though by then the lower court's interpretation was consistent with the Department's then-current policy statement on the cap. Pet. App. 29. The Federal Circuit is apparently of the view that the Department may, as a matter of policy, extend or withhold the benefits of the cap to liabilities secured by bonds even though the language of the statute extends the benefits only to liabilities secured by cash deposits.

The United States now contends that this issue "has no continuing importance" because the Department "has now changed its policy to preclude a company from limiting its liability by posting a bond." Brief in Opposition at 8. Contrary to this assertion by the United States, however, the current codification of the regulation in point still reflects the position that the cap extends to bonds as well as to cash deposits, even though that position was repudiated in the Department of Commerce's 1992 policy statement. *Compare* 19 C.F.R. § 353.23 (1993) *with* 57 Fed. Reg. 45,769 (Oct. 5, 1992). The issue that is of continuing importance does not revolve around the dubious proposition that Commerce has finally gotten it right insofar as the cap is concerned, but whether the Federal Circuit will ever be willing to conduct a step one *Chevron* analysis where "Congress has directly spoken to the precise question at issue." 467 U.S. at 842. If not, there is nothing to stop the Department from issuing yet another policy determination to which the Federal Circuit will again extend deference.

The Department of Commerce, supported by the unrestrained deference afforded its actions by the Federal Circuit and secure in the knowledge that this Court has not given plenary review to an international trade case since 1978, is presently free to read critical provisions into or out of the international trade laws administered by it. The intent of Congress, expressed in the plain meaning of the words it enacted into law, is being frustrated. The Federal Circuit's willingness to yield to the Department of Commerce, even when the words used in the statute are clear, disrupts our system of checks and balances and deprives interested parties of their right to effective judicial review of agency action. This problem is particularly acute here because the Federal Circuit is a

court of specialized jurisdiction that hears all appeals under the laws regulating international trade. A writ of certiorari to the Federal Circuit should issue to address this important problem.

Respectfully submitted,

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